

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Rulemaking to Amend)	
47 C.F.R. §§ 76.64, 76.93, and 76.103)	MB Docket No. RM-11203
)	
Retransmission Consent,)	
Network Non-Duplication, and)	
Syndicated Exclusivity)	



REPLY

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SUMMARY

ACA's Petition proposes limited adjustments to the Commission's broadcast signal carriage regulations. The adjustments will address the following problem: When dealing with small and medium-sized cable companies, owners of network stations are making unprecedented demands for cash. At the same time, they are using exclusivity regulations and network affiliate contracts to block access to lower-cost alternatives. The cost to consumers? An estimated \$1 billion in the upcoming round.

The record overwhelmingly endorses ACA's proposal. Support comes from small and medium-sized cable operators across the US, small telephone companies, competitive providers, associations representing more than 2,300 companies, and programmers including Hallmark and CourtTV. The record corroborates that sharply increased fees for retransmission consent will harm consumers and competition and shows how the ACA proposal provides a narrowly-tailored, deregulatory, market-driven solution.

The record also contains extremely important input from the broadcast industry. The comments of Block Communications, a small broadcast station group owner, makes clear that using exclusivity to charge substantial retransmission consent fees is bad for consumers and bad policy.

A few opponents have also filed – NAB, Disney, NBC, Pappas, and Duhamel. The Petition's opponents avoid the central question posed by the Petition: Should consumers served by smaller and mid-sized cable companies pay an extra \$1 billion for basic cable because of new retransmission consent cash demands? The opposition skirts this question for good reason – the harm to consumers and competition is manifest, and no policy supports using broadcast licenses to inflict this harm.

The record contains ample basis for granting ACA's proposal now. The record shows:

The problem of retransmission consent pricing is real. Broadcasters have assured small and medium-sized cable operators across the U.S. that they can expect to pay unprecedented retransmission consent fees in the upcoming round. See Section II.A., pp. 4-7.

The cost of new retransmission consent fees will likely exceed \$1 billion. ACA's estimate of additional retransmission consent costs of \$860 million was low. Based on the calculations of the National Cable Television Cooperative ("NCTC"), the industry expert in transactions involving the smaller cable sector, absent change, the cost will likely exceed \$1 billion. See Section II.B., pp. 8-9.

The record shows how sharply increased retransmission consent fees will harm consumers and competition. The comments of cable operators, small telcos, trade associations, and NCTC all demonstrate how small and medium-sized cable operators have no choice but to increase basic cable rates to cover sharply higher retransmission consent fees. This will harm consumers. Many smaller MVPDs compete against much larger MVPDs. Higher retransmission consent fees imposed on smaller companies will hurt their ability to compete. See Section III.A., pp. 10-17.

Station group owner Block Communications confirms that charging smaller cable companies substantial retransmission consent fees will harm consumers and is bad policy. The record contains the insightful comments of small station group owner Block Communications. From a broadcaster's perspective, Block confirms that broadcasters have substantial market power over smaller cable companies and can use exclusivity to extract substantial retransmission consent fees. But according to Block, this is bad for consumers and bad policy. See Section III.B., pp. 17-20.

As described by NCTC, ACA's proposal will moderate retransmission pricing and result in mutually beneficial carriage arrangements with local broadcasters. The comments of NCTC contain a thorough analysis of how ACA's proposal will work to ensure mutually beneficial carriage arrangements and avoid sharply higher retransmission consent costs, all through marketplace transactions. See Section III.C., pp. 20-24.

ACA's proposal aligns with the Commission's policy concerns about broadcast exclusivity. The Commission has repeatedly stated that broadcast exclusivity: (i) remains subject to adjustment in the face of changed conditions; and (ii) serves to protect broadcasters, but not as a tool to extract revenue from consumers. ACA's proposal is fully consistent with these longstanding policies. See Section IV.A., pp. 25-27.

ACA's proposal aligns with the Congressional intent underlying retransmission consent. In enacting Section 325(b), Congress intended to create a marketplace for retransmission consent. At the same time, Congress expressly directed the Commission to protect basic cable rates from unreasonable increases related to retransmission consent. Consistent with this intent, ACA's proposal will enhance the marketplace for retransmission consent while protecting consumers from unreasonable basic rate increases. See Section IV.B., pp. 27-29.

The opposition fails to offer any credible basis for denying the limited, narrowly-tailored, market-based adjustments proposed by ACA. Section V.A. replies to NBC's assertion that, as a broadcast network, it has an inalienable right to restrict affiliates stations' ability to grant retransmission consent. NBC's position fails on three grounds;

- By distributing broadcast programming, NBC becomes subject to, and a beneficiary of, the cable compulsory copyright license, which entitles a cable operator to carry all programming on a distant signal.
- By restricting an affiliate's retransmission consent rights, NBC commits an unauthorized change of control in violation of 47 U.S.C. § 310(d).

- By restricting affiliates' retransmission consent rights, NBC violates the good faith negotiation regulations.

See pp. 30-35.

Section V.B. replies to Disney's assertion that its stations have a "fair market value" of \$2.00 per subscriber per month. As shown, cable operators can obtain the same programming elsewhere at a fraction of the cost, except they need Disney's permission to do so. Consequently, there is no "fair market" valuing Disney's stations and nearly all the price results from Disney blocking lower-cost substitutes. See pp. 36-37.

Section V.C. replies to 14 arguments raised by NAB against the Petition. NAB relies on misleading, fallacious or irrelevant arguments and provides no credible reason why the Commission should not adopt ACA's proposal immediately. See pp. 38-54.

Section V.D. replies to Pappas' claim that ACA has filed the Petition "to create a false sense of urgency." As indicated, the Petition arises from broadcasters' escalating cash demands, the timing of which is beyond our control. See p. 55.

Section V.E. and F. reply to Duhamel and the Community Broadcasters Association, respectively. See pp. 56-57.

Section VI concludes by showing how the Commission has the authority, and the duty, to protect consumers by adopting ACA's proposal now. See p. 58.

I. INTRODUCTION

When dealing with small and medium-sized cable companies, owners of network stations are making unprecedented demands for cash. At the same time, they are using exclusivity regulations and network affiliate contracts to block access to lower-cost alternatives. For consumers served by small and medium-sized cable companies, this conduct will increase the cost of basic cable more than \$1 billion.

In response to this fundamental change in the “price” of retransmission consent, ACA has filed the Petition.¹ The Petition requests limited adjustments to three regulations. The adjustments will achieve the following results:

- Maintain broadcast exclusivity for stations that elect must-carry or that do not seek additional consideration for retransmission consent.
- Eliminate exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a smaller cable company.
- Prohibit any party from preventing a broadcast station from granting retransmission consent to a smaller cable company.

These adjustments will enable marketplace pricing of retransmission consent when a broadcaster deals with a smaller cable company. The adjustments are limited and narrowly-tailored, affecting less than 8% of U.S. television households.

The record overwhelmingly endorses ACA’s proposal.² Support comes from small and medium-sized cable companies across the U.S., small telephone companies,

¹ American Cable Association Petition for Rulemaking, *In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity* (filed Mar. 2, 2005) (“Petition”).

² Exhibit A contains a list of supporting comments.

competitive providers, associations representing more than 2,300 companies, EchoStar and programmers including Hallmark and CourtTV. The record corroborates that sharply increased fees for retransmission consent will harm consumers and competition and shows how the ACA proposal provides a narrowly-tailored, deregulatory, market-driven solution.

The comments of the National Cable Television Cooperative (“NCTC”) are especially enlightening. NCTC is the expert in transactions involving the smaller cable sector. NCTC describes with authority the problem with current retransmission consent “pricing” and how ACA’s proposal will help solve that problem through straightforward marketplace forces.

The record also contains extremely important input from the broadcast industry. The comments of Block Communications, a small broadcast station group owner, make clear that using exclusivity to charge substantial retransmission consent fees is bad for consumers and bad policy. Block Communications describes how ACA’s proposal presents no harmful threat to broadcasters, including smaller market broadcasters.

A few opponents have also filed – NAB,³ Disney,⁴ NBC,⁵ Pappas,⁶ and Duhamel.⁷ For the most part, the opponents rely on misleading, fallacious or irrelevant arguments. While filling many pages with mean-spirited rhetoric, the Petition’s

³ Comments of National Association of Broadcasters et al. (“NAB Opposition”).

⁴ Comments of Walt Disney Company (“Disney Opposition”).

⁵ Comments of NBC Universal, Inc. & Telemundo License Co. (“NBC Opposition”).

⁶ Comments of Pappas Telecasting Companies (“Pappas Opposition”).

⁷ Comments of Duhamel Broadcasting Enterprises (“Duhamel Comments”).

opponents avoid the central question posed by the Petition: Should consumers served by smaller and mid-sized cable companies pay an extra \$1 billion for basic cable because of new retransmission consent cash demands? The opposition skirts this question and for good reason – the harm to consumers and competition is manifest, and no policy supports using broadcast licenses to inflict this harm.

Because of this, we first focus on the central issue in the Petition, and how the record conclusively frames that issue. We also address the clear authority of the Commission to make the changes proposed in the Petition. We then reply to filings against the Petition.

II. THE RECORD VALIDATES THE CENTRAL QUESTION RAISED IN THE PETITION – SHOULD THE COMMISSION MAKE MINOR ADJUSTMENTS TO ITS REGULATIONS OR SHOULD CONSUMERS SERVED BY SMALLER AND MID-SIZED CABLE COMPANIES PAY AN EXTRA \$1 BILLION FOR BASIC CABLE?

The Petition articulates the problem as follows:

For consumers served by the small cable sector, broadcaster cash demands threaten to add more than \$860 million to the cost of basic cable. Currently, the “pricing” of retransmission consent does not occur in a competitive market. To the contrary, powerful broadcasters demand a “price” for retransmission consent while at the same time blocking access to readily available lower cost substitutes.⁸

The record shows that this problem faces small and mid-sized cable companies across the U.S., and the price tag for consumers will exceed \$1 billion. Absent a change, broadcasters’ conduct will soon dump on the Commission and consumers a retransmission consent crisis.

A. The record shows that broadcasters are targeting small and medium-sized cable companies with unprecedented retransmission consent fees.

The record resoundingly confirms the coming retransmission consent crisis. A sample from the comments follows.

Atlantic Broadband. Atlantic Broadband is a new entrant into the smaller cable sector. After purchasing systems from Charter Communications, the company now serves about 250,000 customers in six states.⁹ Atlantic Broadband’s retransmission consent experiences as a new entrant are telling:

⁸ Petition at 1 (emphasis added).

⁹ ABB Comments at 2-3.

In the thirteen months since Atlantic Broadband began operations, it has experienced first-hand the abuses of the current system for broadcast carriage, which foreshadow the larger scale crisis that awaits independent cable operators as we approach the 2006 carriage election cycle.¹⁰

* * *

In Atlantic Broadband's markets, broadcaster's demands will cost the Company and its subscribers almost \$30 million during the three year election cycle. The result is that consumers will face significant increases for a service that many consumers already believe is too expensive.¹¹

Cebridge Connections. Cebridge serves about 400,000 subscribers spread over 700 small cable systems in 23 states.¹² The company faces retransmission consent demands from each network and most of the major affiliate groups, and reports the following:

Broadcasters have made it clear that they will levy new cash-for-carriage demands, which (in turn) could force us to charge an additional \$5 to \$10 per customer per month.¹³

* * *

In our markets alone, broadcaster demands could cost our company and its subscribers \$19 million or more next year – and approximately \$60 million over the three-year life of the agreements.¹⁴

Frankfort Plant Board (“FPB”). FPB, a nonprofit government agency, is one of the country's oldest municipal systems, first providing service in 1952.¹⁵ FPB now

¹⁰ ABB Comments at 1.

¹¹ ABB Comments at 12.

¹² Cebridge Comments at 1.

¹³ Cebridge Comments at 1.

¹⁴ Cebridge Comments at 2.

¹⁵ FPB Comments at 1.

serves about 17,600 customers in and around Franklin, Kentucky. FPB's comments and those of other municipal systems and cooperatives show that nonprofit status is immaterial to broadcasters seeking to extract cash from smaller market consumers.¹⁶

[Network broadcasters] have each told me personally that FPB should expect requests for cash payments in the upcoming round of negotiations . . . Because we are a nonprofit organization that exists only to provide service as economically as possible, we have no choice but to pass this anticipated cost onto our customers. Broadcasters' demands could cost...subscribers in excess of \$1,000,000 per year.¹⁷

Full Channel TV, Inc. A family-owned small cable company, Full Channel serves about 7,700 customers in Rhode Island.¹⁸ Like small cable companies across the country, Full Channel has already "gotten the word" from broadcasters.

CBS and NBC have already approached me with demands of \$0.50 to \$0.70 more per subscriber per month in the next round. . . we have no choice but to pass this cost onto our customers. . . Broadcasters' demands will cost my company and our subscribers at least \$139,356.¹⁹

Rapid Communications. Rapid Communications serves about 17,800 customers in small systems spread over six states. The company reports the same message from broadcasters: "[B]roadcasters have already approached me with demands of \$0.60 or more per subscriber per month in the next round."²⁰ Rapid

¹⁶ Alameda P&T Comments at 2; City of Bardstown Comments at 2; City of Wyandotte Comments at 1-2; Glasgow Comments at 1-2; Hubbard Comments at 2; Paragould Comments at 1-2.

¹⁷ FPB Comments at 2.

¹⁸ Full Channel TV Comments at 1.

¹⁹ Full Channel TV Comments at 2.

²⁰ Rapid Comments at 1.

estimates new retransmission consent costs will exceed at least \$700,000/year for their small company.²¹

St. Mary's Cable Television. St. Mary's serves about 5,900 customers in northwest Pennsylvania.²² The company is already facing cash demands and estimates that it will need to increase basic cable rates 10% to cover these.²³ St. Mary's general manager, Mr. Ron Snelnick, describes the explicit use by broadcasters of exclusivity to extract cash from rural consumers:

I also currently carry a distant NBC affiliated station, who has not asked for any cash compensation. WJAC [the in-market NBC owned by Cox Broadcasting] has stated that if we don't pay them . . . they have the rights, and will enforce it, to require the distant NBC to stop granting us retransmission consent and force us to drop the distant NBC affiliate's signal.²⁴

It is important to note that St. Mary's is beyond the protected zone for WJAC, so the station has no non-duplication rights. Apparently, WJAC will invoke restrictions in NBC affiliate agreements, effectively extending exclusivity throughout the DMA.

The record contains more than 50 similar examples from small and medium-sized cable companies, along with supporting comments from trade associations representing 2,300 cable companies, rural co-ops, and small telephone companies.²⁵ The opponents of the Petition fully acknowledge these plans, seeking to reserve all

²¹ Rapid Comments at 2.

²² St. Mary's Cable Television Comments at 1.

²³ St. Mary's Cable Television Comments at 1.

²⁴ St. Mary's Cable Television Comments at 2.

²⁵ See Exhibit A.

rights to charge smaller cable companies high retransmission consent fees, while blocking lower-cost alternatives.

B. The record shows that small and medium-sized cable operators face new retransmission consent fees in excess of \$1 billion.

The Petition estimates that small and medium-sized cable companies will face new cash demands of at least \$860 million.²⁶ The record shows that this estimate is low. Absent the changes requested by the Petition, the cost will likely be much higher.

The letter from Michael Pandzik, President and CEO of the National Cable Television Cooperative (“NCTC”), provides critical information for the Commission. NCTC is the industry’s expert in negotiations involving the small cable sector. As explained by Mr. Pandzik:

[NCTC] is a wonderful organization staffed with superb executives with experience in cable programming, small cable company operations, and major MSO operations. We have negotiated prices, terms and conditions for thousands of transactions, including transactions with all the major media conglomerates. From this experience, NCTC has a deep knowledge of the business issues facing our members, and we understand the dynamics and economics of transactions between smaller cable companies and the major media organizations better than anyone. Although we do not negotiate retransmission consent, which is inherently a local transaction, we have received a wealth of information over the years about what happens in retransmission consent negotiations involving both large and smaller cable companies.²⁷

From this experience, NCTC ran its own calculation of new retransmission consent costs. Bottom line: absent a change, the smaller cable sector and the consumers they serve will pay in excess of an additional \$1 billion.

²⁶ Petition at 24-25.

²⁷ NCTC Comments at 2.

NCTC believes that the ACA's estimate is conservative, and that the cost will likely be higher for at least two reasons. First, since some broadcasters have already demanded that small cable operators pay \$1 per subscriber per month, the ACA's average cost of \$0.75 per major network may be low. Disney/ABC has stated that it will charge between \$0.70 and \$0.80 per subscriber per month, while arguing that their stations are worth in excess of \$2 per subscriber per month. If unchecked, nothing short of the loss of carriage of Disney/ABC's signals will prevent it from migrating its price to \$2. We expect the other major networks will follow suit. In particular, at least two of the other Big Four have also asked for cash consideration in the same price range as Disney/ABC. Second, ACA limits its estimate to the demands from the Big Four. Other networks and stations, e.g., broadcasters affiliated with WB and UPN, are also already seeking cash consideration in the range of \$.25-.35 per subscriber per month, knowing their demands are backstopped by their ability to block access to other affiliates. Accordingly, we believe the added costs of retransmission consent pricing in the smaller cable sector will more likely exceed \$1 billion over the next three years.²⁸

Other commenters support this conclusion.²⁹

In short, as stated by NCTC, "the problem of retransmission consent pricing is very real."³⁰ That problem leads to the following question – Should the Commission act and adjust its regulations or should consumers served by small and medium-sized cable companies pay an additional \$1 billion to broadcasters next round?

The record makes clear that the Commission must act.

²⁸ NCTC Comments at 3.

²⁹ Block Comments at 4-5; Millennium Comments at 4-5, 6-7; CPWS Comments at 1 (reporting cash demands from Sinclair-owned WB and UPN affiliates).

³⁰ NCTC Comments at 2.

III. THE RECORD SHOWS HOW SHARPLY HIGHER RETRANSMISSION CONSENT FEES WILL HARM CONSUMERS AND COMPETITION, AND HOW ACA'S PROPOSAL PROVIDES A LIMITED, NARROWLY-TAILORED, MARKET-BASED SOLUTION.

As described in the Petition, broadcasters' use of exclusivity to extract sharply higher retransmission consent fees from small and medium-sized cable companies will harm consumers and competition.³¹ By adopting ACA's proposal, the Commission will avert this harm.³² The record confirms these conclusions with force.

A. The comments of cable operators and associations representing more than 2,300 companies confirm that sharply increased retransmission fees will harm consumers and competition.

Small and medium-sized cable companies from across the U.S. confirm that they have no option but to add sharply higher retransmission consent fees to the cost of basic cable. Associations representing more than 2,300 companies confirm this. A sample of the record follows:

Alameda Power and Telecom. Alameda P&T is a municipally-owned system serving about 9,500 customers in the City of Alameda.³³ Aladema P&T states that broadcasters in its market "have made clear that they will force us to charge an additional \$5 to \$6 dollars per subscriber per month for basic cable."³⁴

Armstrong Utilities, Inc. Armstrong serves about 227,000 customers in Pennsylvania, Ohio, Maryland, West Virginia and Kentucky, predominantly in suburban

³¹ Petition at 11.

³² Petition at ii-iii, 2, 24-25.

³³ Alameda P&T Comments at 1.

³⁴ Alameda P&T Comments at 1.

and rural markets.³⁵ Armstrong writes, “Many of our retransmission agreements expire at the end of 2005 and thus negotiations have begun. This time, broadcasters want us to pay cash. . . we will have no choice but to pass those costs on to the customer . . . these demands will force us to increase our rates possibly as high as \$5 per subscriber per month for basic cable.”³⁶ To be clear, Armstrong does not reject appropriate consideration for carriage. “As stated in the petition, the problem is not that broadcasters demand a ‘price’ for retransmission consent. The problem is they block our ability to find lower-cost alternatives.”³⁷

Buford Media Group. Texas-based Buford Media Group serves about 55,000 customers in Arkansas, Kansas, Mississippi, Oklahoma, and Texas.³⁸ Buford’s largest system serves 6,700 customers and its smallest serves 100. Buford reports, “Broadcasters have already approached me with demands for \$0.50 or more per subscriber in the next round. Because our margins are already stretched thin, we have no choice but to pass this cost onto our customers.”³⁹

Galaxy Cablevision. Galaxy Cablevision serves about 55,000 customers spread over 179 systems in 13 states.⁴⁰ Galaxy reports that the company has already

³⁵ Armstrong Comments at 1.

³⁶ Armstrong Comments at 1-2.

³⁷ Armstrong Comments at 2.

³⁸ Buford Comments at 1.

³⁹ Buford Comments at 2.

⁴⁰ Galaxy Comments at 1.

received cash demands for the next round of at least \$0.50 per station, and “will have no choice but to pass this onto our customers.”⁴¹

Galaxy describes the competitive consequences for a smaller cable company. “Basically, this will in turn force many of our customers to switch to satellite instead of paying for more increases in cost. Our business is steadily shrinking and these types of demands are forcing cable companies to shut down which takes choice away from consumers.”⁴²

Mediacom Communications Corporation. Operating systems in 23 states, Mediacom brings a broad perspective to this proceeding.⁴³ In joint comments with Cebridge, Mediacom describes the consequences of sharply higher retransmission consent fees:

The ACA estimates that the impact to its members of the cash for carriage demands in the upcoming round could be an additional \$5 per customer per month. It is essential to keep in mind that consumers ultimately bear the costs of retransmission consent . . . Cable companies, for the most part, simply cannot afford to absorb the extra costs and must pass all or most of the added expense to subscribers. Since broadcast networks are carried on the basic tier, those required to pay will include customers who subscribe only to a “lifeline” basic, such as senior citizens on low fixed incomes or others who cannot afford to buy expanded basic services.⁴⁴

* * *

If Mediacom’s or Cebridge’s cable systems, which carry from 8 to 20 broadcast stations eligible to elect retransmission consent, were required to pay from \$0.70 to \$2.00 per subscriber per month, the additional wholesale cost would be from \$5.60 to \$40.00 per subscriber per month,

⁴¹ Galaxy Comments at 2.

⁴² Galaxy Comments at 2.

⁴³ See http://www.mediacomcc.com/corporate_aboutus.html.

⁴⁴ Mediacom & Cebridge Comments at 6.

and subscribers, many of whom are already complaining about rates, could see their monthly cable or DBS bills increase by that amount (plus taxes and franchise fees mandated by government.) So much for preserving “free” broadcast television.⁴⁵

Beyond this, Mediacom’s comments contain a detailed description of the challenges facing non-vertically integrated cable companies that, like Mediacom and Cebridge, focus on serving smaller markets and rural areas.⁴⁶ For the reasons stated in Mediacom Comments, ACA supports extension of ACA’s proposal to medium-size cable companies such as Cebridge and Mediacom.

Nelsonville TV Cable. Nelsonville TV Cable, a family-owned small cable company, serves about 6,000 customers in rural Ohio.⁴⁷ Company president and Korean War vet Eugene Edwards writes:

It is clear that if these people [broadcasters] are not brought into control, we will be forced to increase our monthly charges to our subscribers. We are serving some rural areas that may only have 3 or 4 homes per mile. We are only charging \$30.00 for 67 channels. Do the math, our margin is small!

By making the limited changes requested by ACA, the Commission will bring some market discipline to retransmission consent “pricing.” This will help keep our costs down and benefit consumers.⁴⁸

⁴⁵ Mediacom & Cebridge Comments at 13.

⁴⁶ Mediacom & Cebridge Comments at 12-23 (describing the lack of leverage of non-vertically integrated operators of rural systems due to insufficient audience share, and describing how the lower disposal income of consumers in smaller markets exacerbates the harm of supracompetitive prices for retransmission consent.)

⁴⁷ Nelsonville Comments at 1.

⁴⁸ Nelsonville Comments at 1.

Comments from more than 50 other cable companies, small telcos, and competitive providers corroborate these statements.

Beyond this, the record contains comments from associations and groups representing more than 2300 companies of all sizes. These comments further describe the harm of broadcasters' use of exclusivity to prop up the "price" of retransmission consent. Excerpts follow.

NCTC. On behalf of more than 1,000 member companies, NCTC states:

The ACA's Petition accurately describes a looming crisis for smaller cable companies. Broadcasters have expressed plans to escalate dramatically the "price" for retransmission consent, and are targeting smaller cable companies for higher cash demands, which would add several dollars per month to the cost of the basic tier. . . Without the adjustments proposed by ACA, consumers served by smaller distributors will either (i) pay sharply higher basic cable rates or (ii) face the very real prospect of losing access to network stations. This will truly be a crisis in rural America, and no public policy supports it.⁴⁹

NCTA. On behalf of cable companies serving 90% of the nation's cable households and programmers owning more than 200 cable networks, NCTA states:

The existence of FCC-conferred blackout rights exacerbates the adverse impact on cable customers of today's "heads-I-win, tails-you-lose" environment for broadcast signal carriage. As ACA's petition points out, the blackout rules can increase the price for cable service by preventing a cable operator from providing cable customers with programming from a willing seller in the form of a more distant network station. In the extreme case, it can serve to deprive cable customers of access to all of a network's programming if an operator and the local affiliate cannot agree on the terms of carriage.

Under these circumstances, the public interest is disserved by granting those local broadcasters that opt not to forgo mandatory carriage rights the artificial leverage inherent in the FCC's blackout rules.⁵⁰

⁴⁹ NCTC Comments at 1.

⁵⁰ NCTA Comments at 3-4.

NTCA. On behalf of 560 small telephone co-ops, NTCA states:

For the most part, the rural telephone companies doing business as MVPDs operate in small markets with low densities. Like the small CATV providers, they face higher costs for access to video content because of the retransmission consent practices of network owners and affiliate groups. These higher costs must ultimately be borne by consumers and exclusivity may even deny rural consumers' access to diverse programming.⁵¹

OPASTCO. On behalf of 560 small telecommunications providers, OPASTCO states:

The Petition does not seek price-setting by the government. The proposed solution would allow the marketplace, rather than any one entity, to determine what price small video providers should pay for content if their original supplier chooses to require additional payment for retransmission consent. . . . The Petition's proposals will help protect consumers from rate shocks necessitated by sudden spikes in costs associated with obtaining retransmission consent.⁵²

OPASTCO also points to the critical link in rural markets between access to reasonably priced content and broadband deployment.

[B]y reducing the ability of broadcasters to extract unwarranted prices for content, ACA's proposals will help encourage more rural carriers to enter the video market using technologies such as DSL and fiber. The entrance of rural carriers into the video market not only provides consumer benefits through increased choices, but also spurs the goal of increasing the availability of broadband in rural areas . . .⁵³

⁵¹ NTCA Comments at 3.

⁵² OPASTCO Comments at 3.

⁵³ OPASTCO Comments at 4.

RTCs, a group of rural telephone companies, state:

Each of the RTCs participating in these comments has experienced first hand the difficulties in obtaining retransmission consent for the carriage of local broadcast stations affiliated with or owned by the major television networks on reasonable and non-discriminatory terms and conditions. RTC's are routinely forced to pay retransmission consent fees that are not imposed on the incumbent cable operators with whom they compete or are forced to pay disproportionately higher rates. Broadcast stations have admitted to various RTCs that these higher rates are imposed in recognition of the fact that, as a new entrant, the competing MVPD cannot survive and expect to gain market share if it does not offer the programming of all the broadcast networks. The RTC's have been told, in effect, that they are being charged more than their entrenched competitors imply because they need network programming for their very survival.⁵⁴

As shown, the record demonstrates the harm to consumers and competition that will result from broadcasters using exclusivity and threats of withdrawal to extract higher fees from small and medium-sized cable companies and consumers.

For the Commission, this concept is not novel. As pointed out by several commenters,⁵⁵ the Commission reached the same conclusion in its analysis of the market for broadcast programming in the *News Corp. Order*.

At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.⁵⁶

* * *

As commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs,

⁵⁴ RTC Comments at 7-8.

⁵⁵ NCTC Comments at 3; Block Comments at 5; ABB Comments at 19-20.

⁵⁶ *News Corp. Order*, ¶ 202.

and could allow it to extract higher prices, which ultimately are passed on to consumers.⁵⁷

* * *

We agree with ACA to the extent it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for “must have” programming.”⁵⁸

In the *News Corp. Order*, the Commission reached these conclusions about retransmission consent generally, *before* addressing transaction specific harms. The opponents of the Petition argue that the Commission should ignore its careful analysis of the market power of local broadcasters in the *News Corp. Order*.⁵⁹ Even a cursory review of the *News Corp. Order* (and nothing about the Commission’s detailed analysis of the broadcaster television market was cursory) shows that the transaction specific conditions were reached in light of broader conclusions of the market power of local broadcasters and the harm of temporary withdrawal. That analysis applies with equal force to this proceeding.

B. Station group owner Block Communications confirms that charging smaller cable companies substantial retransmission consent fees will harm consumers and is bad policy.

To evaluate the Petition, we understand that the Commission must consider the comments of broadcasters, and we encourage that inquiry. The starting point should be the balanced and insightful comments submitted by Allan Block, the chairman of Block

⁵⁷ *Id.*, ¶ 204.

⁵⁸ *Id.*, ¶ 176.

⁵⁹ NAB Opposition at 3, 4; NBC Opposition at 17-18; Pappas Opposition at 7-8.

Communications, owner of a five-station group and two small cable systems.⁶⁰ The comments warrant careful consideration by the Commission, especially in light of the claims made by other broadcast interests.

Mr. Block writes:

As a broadcaster and smaller cable company, we bring a unique perspective to this proceeding. From this viewpoint, we can unequivocally state the following:

Broadcasters' current plans to charge smaller cable companies substantial retransmission consent fees while at the same time blocking access to lower cost alternatives will hurt consumers, competition, and localism. The Commission must adjust its regulations to avert these harms.⁶¹

Mr. Block then describes his company's public interest obligations as a broadcaster, and how the use of retransmission consent and exclusivity to increase costs for cable consumers conflicts with those obligations.

As a small broadcaster and small cable company, we also understand very well the dynamics of retransmission consent. In negotiating retransmission consent, on either side of the bargaining table, we work toward mutually beneficial carriage arrangements. Equally important, we work toward carriage arrangements that benefit the most important parties affected by these negotiations – our viewing audience, our customers, and the greater communities that we serve. To us, this means keeping the advertising market healthy to support our stations. This also means keeping our broadcast signals on local cable systems so customer viewing patterns are not disrupted. Finally, and most importantly, this means keeping down costs for consumers.

Each of these objectives aligns with important public interests that the Commission serves to protect. At the same time, each of these objectives is threatened by broadcasters' plans to charge smaller cable companies substantially higher retransmission consent fees. These plans will hurt consumers, competition and localism, and are especially dangerous for

⁶⁰ Block Comments at 2.

⁶¹ Block Comments at 1.

smaller cable companies as they strive to remain in business amid the climate of consolidation. This is why we strongly support ACA's Petition.⁶²

Mr. Block also describes the importance of exclusivity in maintaining audience reach and ratings. Unlike the other broadcast participants, Mr. Block openly acknowledges that exclusivity can be used as a tool to extract cash from smaller cable companies.

As a broadcaster, we know the importance of exclusivity in maintaining our audience. Viewers lead to ratings, which lead to ad revenue. That is the model on which our broadcast business was built. That is also the model on which broadcast exclusivity developed.

As a broadcaster, we also understand that we could use exclusivity to charge substantial fees for retransmission consent, especially when dealing with smaller cable companies. Four of our five stations are affiliated with the Big Four networks. These stations carry "must have" programming for cable operators. Under current regulations, we could threaten temporary withdrawal unless our smaller cable company distributors paid us substantial fees. We could then use the exclusivity regulations and restrictions in affiliate agreements to prevent them from getting the programming elsewhere. We *could* do this, but we choose not to.

BCI does not charge substantial retransmission consent fees for three principal reasons: (i) it is bad for consumers; (ii) it is bad policy; and (iii) any problems with ad-supported broadcasting should not be solved by increasing costs for cable consumers.⁶³

Mr. Block also confirms a key point from the Petition – smaller cable companies present no competitive threat to local broadcasters.⁶⁴ Because of this, temporary or

⁶² Block Comments at 2-3.

⁶³ Block Comments at 6.

⁶⁴ Block Comments at 7.

permanent withdrawal hurts the smaller cable company, while having little, if any, impact on the broadcaster.

As a broadcaster, we can fully validate ACA's statement that no smaller cable company presents a competitive threat to our broadcast stations today. In short, they need our programming more than we need their subscribers. To use exclusivity regulations to further disadvantage smaller cable companies and extract higher fees squarely conflicts with the long-standing policy basis for those regulations.⁶⁵

We ask the Commission to pay close attention to the comments of Block Communications. From a broadcaster's perspective, they describe the same marketplace conditions and public interest harms set forth in the Petition and elsewhere on the record. In contrast, the arguments of Disney, NBC, NAB and Pappas portray a different world, one where localism and the public interest are somehow advanced when broadcasters can use exclusivity to extract an additional \$1 billion from customers of small and medium-sized cable companies. In reviewing those cynical arguments, we encourage the Commission to compare the balanced and thoughtful analysis of Block Communications.

C. As described by NCTC, the expert in negotiations in the smaller cable sector, ACA's proposal will moderate retransmission pricing through competition and will result in mutually beneficial carriage arrangements with local broadcasters.

ACA's proposal would remove barriers to carriage of other network signals, when an in-market station seeks additional consideration for retransmission consent. The Petition's opponents claim this will result in a range of awful outcomes. These include

⁶⁵ Block Comments at 7.

network stations “cannibalizing” other stations’ markets,⁶⁶ stations becoming national affiliates,⁶⁷ or stations becoming “Starbucks on every corner.”⁶⁸ The record provides no indication of how these outcomes would occur, or for that matter, why they would be such catastrophes. Regardless, the Commission can readily conclude that the likelihood of these outcomes is nil. ACA’s proposal would affect, at most, cable systems serving only 8% of television households.

The record does contain important analysis of how ACA’s proposal will work. In this regard, the comments of NCTC are instructive.

ACA’s proposal recognizes several fundamental aspects of broadcast signal carriage. First, there is value to a local broadcaster of being carried on a cable system, and there is value to a cable operator in carrying network and local programming. Second, that exchange of value can be determined through negotiations. Third, the problem is how that value exchange is currently “priced.” In the absence of alternative suppliers, broadcasters are demanding extraordinary, artificially-supported prices, and setting them as high as possible. Fourth, when a supplier faces competition, the supplier responds by improving the product, lowering the price, or both. At NCTC we see this basic element of pricing theory in practice daily, and it works.

In limited circumstances, ACA’s proposal will create a marketplace for retransmission consent by removing impediments that currently prevent a smaller cable company from negotiating carriage with an out-of-market broadcaster.⁶⁹

NCTC then describes three phases of negotiations under the ACA proposal. The most likely outcome? Continued carriage of local signals through mutually beneficial carriage arrangements.

⁶⁶ NAB Opposition at 19.

⁶⁷ NBC Comments at 21.

⁶⁸ Pappas Comments at 9.

⁶⁹ NCTC Comments at 4.

Phase I – general agreement over value and price. The first phase involves negotiations where the “bid and ask” fall within parameters generally acceptable to the parties.

In most cases, price negotiations between an in-market broadcaster and a smaller cable company will result in an agreement with a “price” for retransmission consent that the parties agree fairly approximates the value of the exchange. Consumers will continue to receive the station. Also importantly, we anticipate that the agreement will likely provide the exclusivity protection the broadcaster desires.⁷⁰

Phase II – initial disagreement over value and price, consideration of alternatives. The second phase involves cases where, at least initially, there is a substantial divergence over relative value, and an inability to close the gap.

In some cases, price negotiations between an in-market broadcaster and a smaller cable company may result, at least initially, in an impasse. The smaller cable operator would be able to seek out and negotiate with an out-of-market broadcaster at a price that may (or may not) be lower than the price requested by the in-market broadcaster. The critical point is that the smaller cable company would have a choice.⁷¹

Phase III – mutual evaluation of opportunity costs of carriage or withdrawal. The third phase involves an evaluation by both the cable operator and the broadcaster of the cost and benefits of carriage or withdrawal. With the presence of alternatives, both parties can better determine the relative value.

The smaller cable company can evaluate the difference in value between the stations. Similarly, the in-market broadcaster can evaluate the difference in value between its initial price (which it may now need to re-evaluate in light of the presence of a competitive supplier) and not being carried. With the potential of losing distribution to an alternative supplier,

⁷⁰ NCTC Comments at 5.

⁷¹ NCTC Comments at 5.

an in-market broadcaster that concludes carriage is more valuable than its initial price may lower its price. Conversely, if the in-market broadcaster values its “price” more than distribution on a smaller cable system, it will not agree to carriage at a lower price, and it can withdraw its signal. From a pricing perspective, either outcome is an efficient transaction – the essence of marketplace pricing. If the in-market broadcaster and the smaller cable company do not reach an agreement, the smaller cable company can complete negotiations with another supplier.⁷²

NCTC concludes that this mechanism will work well to result in mutually beneficial carriage arrangements for local signals.

Knowing the marketplace and NCTC members as we do, I am confident that ACA’s proposal will result in smaller cable companies continuing to carry local broadcasters through a fair exchange of value.⁷³

Far from the market “cannibalism” and “collapse” of the entire network/affiliate structure claimed by the opposition, NCTC describes a rational, orderly negotiation process that will lead to efficient outcomes for cable operators, local broadcasters, and most importantly, consumers.

At least one broadcaster corroborates NCTC’s analysis. Small station group owner Block Communications states:

[A]s both a broadcaster and smaller cable company, we have a balanced perspective on how ACA’s proposal will work in the marketplace. It is straightforward. In limited circumstances, ACA’s proposal will remove impediments that currently prevent a smaller cable company from negotiating carriage with an out of market broadcaster, but only in limited circumstances. Removing these impediments will create a genuine marketplace for retransmission consent, while maintaining exclusivity protection for broadcasters that need it.

⁷² NCTC Comments at 5.

⁷³ NCTC Comments at 5.

This mechanism will lead to lower retransmission consent “prices”. Based on BCI’s 100 years of experience operating diverse media and communications properties, we can validate the following fundamental economic principal: When Supplier A of a good or service faces competition from Supplier B, Supplier A will respond by improving its product, lowering its price, or both. This works the same whether the supplier sells printing presses, telecommunications equipment, or set-top boxes. It will work the same way in retransmission consent.⁷⁴

Block Communications acknowledges that ACA’s proposal may result in limited competition in certain instances. The Commission should pay careful attention to the broadcaster’s observation on this point.

As a broadcaster, we are not threatened by the prospect of this limited competition. We know that our in-market station is valuable to cable operators, and so long as we “price” retransmission consent appropriately, we will be carried and we can maintain exclusivity.⁷⁵

As the above summary indicates, the record describes the coming retransmission consent crises, and the Commission, in adopting ACA’s proposal, can avert that crisis. In the end, in the vast majority of cases, local stations will continue to be carried, broadcasters will receive appropriate, market-determined consideration, and advertising markets will remain protected. Most importantly, consumers will benefit.

⁷⁴ Block Comments at 8-9.

⁷⁵ Block Comments at 9.

IV. THE COMMISSION HAS AMPLE AUTHORITY TO MAKE THE LIMITED ADJUSTMENTS PROPOSED IN THE PETITION.

The record validates the Commission's authority to adopt ACA's proposal. As set forth in the Petition, and supported by diverse commenters, the requested changes align precisely with the Commission's policy concerning its broadcast exclusivity and with Congressional intent underlying retransmission consent.

A. The ACA proposal aligns with longstanding Commission policy concerning broadcast exclusivity.

The Petition asks the Commission to adjust its exclusivity regulations in light of changed conditions and to avert imminent harm to consumers and competition.⁷⁶ The Commission has repeatedly stated that it will adjust exclusivity regulations, even eliminate them, for precisely these reasons. In 1966, the Commission stated:

We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct.⁷⁷

Again in 1972:

[T]he Commission retains full freedom and, indeed, the responsibility to act as future developments warrant.... [A]s we gain experience and insight, we retain the flexibility to act accordingly—to make revisions,

⁷⁶ Petition at 18-25.

⁷⁷ *In the Matter of Amendment of Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters*, Docket Nos. 14895, 15233, and 15971, Second Report and Order, 2 FCC 2d. 725 (1966) ("1966 Cable Carriage Order"), ¶ 27 (citing *In the Matter of Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave States to Relay Television Signals to Community Antenna Systems*, Docket Nos. 14895 and 15233, First Report and Order, 38 FCC 683 (1965) ("1965 Cable Carriage Order"), ¶ 57).

major or minor—and to keep pace with the future of this dynamic area of communications technology.⁷⁸

And, as pointed out by Atlantic Broadband, again in 1988:

The actions we take today are only the latest of many corrections to our regulatory course. Like those preceding them, these changes are prompted by both market and analytical developments and follow from our close reexamination of whether, in light of those developments, our current market rules still best serve the public interest.⁷⁹

Similarly, the Commission has repeatedly stated that broadcast exclusivity serves to protect broadcasters from unfair competition from cable, and not as a tool to extract revenue from consumers. In 1980, the Commission said:

Because competition is the general requirement, the Commission is not to be concerned with the effects of competition on station revenues or profits. It must be concerned, however, if there is evidence that competition is so destructive or debilitating that it results in a loss of broadcast service to the public.⁸⁰

And again in 1988:

Our analysis suggested that because the network programming material is identical, the rules actually protect the local advertising and the public service announcements within and adjacent to network programming. They do not, however, allow the network to increase its revenues; nor was this their intent.⁸¹

⁷⁸ *In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Cable Television Report and Order*, 36 FCC 2d. 141 (1972) ("1972 Syndex Order"), ¶ 66.

⁷⁹ ABB Comments at 9 citing *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, Gen. Docket No. 87-24, 3 FCC Rcd. 5299 (1988) ("1988 Syndex Order"), ¶ 7.

⁸⁰ *In the Matter of Cable Television Syndicated Program Exclusivity Rules; Inquiry into the Economic Relationship between Television Broadcasting and Cable Television*, Dockets No. 20988 and 21284, Report and Order, 79 FCC.2d 663 (1980) ("1980 Syndex Order"), ¶ 7 (emphasis added).

⁸¹ 1988 Syndex Order, ¶ 110 (emphasis added).

These statements firmly establish that the use of broadcast exclusivity to increase costs for consumers conflicts with Commission policy, and the Commission has a duty to act.

Despite this history, the Petition's opponents hypothesize that the regulations have become immutable entitlements, now requiring an act of Congress to change.⁸²

The comments of Millennium Digital Media debunk this theory:

In adopting the retransmission consent rules, Congress obviously had the opportunity to memorialize and transform the Commission's Exclusivity Rules into statute, but it did not do so, instead leaving them only as regulations, subject to change by the Commission. . .⁸³

The changes proposed in the Petition adhere closely to the Commission policy articulated above. As explained in the Petition, circumstances have changed, small and medium-sized cable companies present no threat of harmful competition to broadcasters, and broadcasters conduct threatens imminent harm to consumers and competition. As aptly summarized by NCTA, "Times, and the law, have decidedly changed since the FCC last assessed the reasons for these rules. . . The time is ripe for a reform. . . ."⁸⁴

B. The ACA proposal aligns with the statutory mandate to promulgate retransmission consent regulations that protect consumers from unreasonable basic cable rates.

The Petition's opponents claim that any change to the status quo would offend Congressional intent underlying retransmission consent.⁸⁵ Notably absent from these assertions is any mention of Congress's express concern about the *costs* of

⁸² Pappas Opposition at 2-3; NBC Opposition at 2; NAB Opposition at 20-23; Disney Opposition at 2-3.

⁸³ Millennium Comments at 3.

⁸⁴ NCTA Comments at 3-4 (emphasis added).

retransmission consent. The reason for this oversight is difficult to discern. The statute⁸⁶ and the Conference Report⁸⁷ prominently display the applicable language.

As pointed out by several commenters, in enacting Section 325(b) Congress expressly directed the Commission to protect basic cable rates from unreasonable increases resulting from retransmission consent.

In the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations adopted under this section do not conflict with the Commission's obligations to ensure that rates for basic cable service are reasonable.⁸⁸

Section 325(b)(3)(A) memorializes this mandate.⁸⁹

When the Commission first addressed retransmission consent in 1993, it had no information.⁹⁰ Today, the Commission has plenty. For starters, there is evidence on this record of broadcasters' plan to increase the costs of basic cable for small and medium-sized cable companies by at least \$1 billion. The Commission has already concluded elsewhere that consumers will bear costs like this.⁹¹ Viewed in this way,

⁸⁵ Pappas Opposition at 2-3; NBC Opposition at 2; NAB Oppositions at 20-23; Disney Opposition at 2-3.

⁸⁶ 47 U.S.C. § 325(b) (2005).

⁸⁷ H.R. Conf. Rep. No. 102-862, 102d Cong. 2d Sess., 1992 U.S.C.C.A.N. 1231, at 1257-59 (1992).

⁸⁸ H.R. Conf. Rep. No. 102-862, at 1258; NCTA Comments at 3; RTC Comments at 8.

⁸⁹ 47 U.S.C. § 325(b)(3)(A).

⁹⁰ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulations*; Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993), ¶ 57.

⁹¹ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News Corp. Order*"), ¶ 204 ("The ability of a
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contrary to the opponents' assertions, a *failure* of the Commission to act conflicts with both the intent of Congress and the express mandate of Section 325(b)(3)(A).

We now turn to the opponents of ACA's proposal.

television station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.”)

V. OPPONENTS FAIL TO OFFER ANY CREDIBLE BASIS FOR DENYING THE LIMITED, NARROWLY-TAILORED, MARKET-BASED ADJUSTMENTS PROPOSED BY ACA.

The Petition attracted opposition from NAB, Disney/ABC, NBC, Pappas, and comments from Duhamel. None of the opponents face the central question raised by the Petition: Should retransmission consent and exclusivity be used to extract an extra \$1 billion consumers served by smaller and mid-sized cable companies? This implies the following broadcaster policy position:

The public interest and localism are served by taking an extra \$1 billion from consumers served by smaller and mid-sized companies and sending it to the corporate owners of broadcast licenses.

As outrageous as this seems, under scrutiny, these are the policy themes woven throughout the oppositions. We turn now to the specific arguments.

A. Reply to NBC.

NBC's Opposition contains arguments similar or identical to NAB's, which we address in Section V.C. Here, we reply to NBC's argument that it has an inalienable right to restrict affiliates ability to grant retransmission consent.

1. As a broadcast network, NBC is subject to both the cable compulsory copyright laws and the retransmission consent laws, and cannot prevent a broadcaster from granting retransmission consent out of a DMA.

The Petition describes two methods through which a broadcaster eliminates lower-cost alternatives. The first is through the broadcast exclusivity regulations, under which a broadcaster can enforce exclusivity within a specified zone, generally 35 miles around a station. The second is through provisions in network affiliate agreements, by

which the network purports to prohibit an affiliate from granting retransmission consent beyond a DMA boundary. This trick essentially gives a network station exclusivity throughout a DMA. The Petition describes how this conflicts with the retransmission consent laws and good faith negotiation regulations.

NBC counters that it has an inalienable right to prohibit any affiliate from granting retransmission consent to an out-of-market cable operator. NBC states, “the right to control the redistribution of programming produced, owned, or licensed by a network or other program distributor must remain with that distributor, both as a matter of fundamental property law and to ensure continued delivery of valuable programming to the public.”⁹² When applied to NBC, a broadcast network, this argument fails for three reasons.

By distributing broadcast programming, NBC becomes subject to, and a beneficiary of, the cable compulsory copyright license, which entitles a cable operator to carry all programming on a distant signal. The first problem for NBC is that it neglects 29 years of cable copyright law. Since 1976, cable operators have had a compulsory license to retransmit broadcast signals, and that license expressly extends to retransmission of distant signals.⁹³ Under the compulsory license, if a cable operator retransmits a distant broadcast signal, it is entitled to retransmit all copyrighted material within that broadcast signal. Of course, the cable operator must pay for this license,

⁹² NBC Opposition at 13.

⁹³ See 17 U.S.C. § 111.

and pay substantially more for distant signals.⁹⁴ The only other condition on the license is that cable carriage complies with FCC regulations. This provides network nonduplication and syndex protection within the compulsory license regime. NBC and other networks benefit from this law, collecting substantial periodic payments.

If NBC desires to prevent cable operators from distributing its network programming, it is already familiar with how to do this – move the programming to satellite delivery. There, subject to the program access laws, the content provider can decline to grant a license for distribution. But once a content provider chooses to benefit from the over-the-air broadcast system, it becomes subject to a compulsory copyright license, and loses the ability to deny carriage.

Retransmission consent did not change this. In enacting Section 325(b), Congress expressly recognized cable operators' rights and obligations under the compulsory license.

Cable systems carrying the signals of broadcast stations, whether pursuant to an agreement with the station or pursuant to the provisions of new sections 614 and 615 of the Communications Act, will continue to have the authority to transmit the programs carried on those signals under the section 111 compulsory license.⁹⁵

Congress made clear that the compulsory license extends to “the programs carried on those signals.” Neither in Section 325(b) nor in Section 111 did Congress create an “NBC exception,” carving out network programming carried outside a DMA. To the contrary, Section 111 has long established the compulsory licensing and compensation

⁹⁴ 17 U.S.C. § 111(d) (a cable system shall on semiannual basis deposit a royalty fee . . . 0.675 of 1 per centum of gross receipts for privilege of further transmitting beyond the local service areas).

⁹⁵ H.R. Conf. Rep. No. 102-862, at 1258 (emphasis added).

mechanism for out-of-market carriage. In short, NBC's argument is with Congress, not ACA. Congress has already determined that the compulsory license extends to all programs within a broadcast signal, local or distant.

By restricting an affiliate's retransmission consent rights, NBC has committed an unauthorized change of control in violation of 47 U.S.C. § 310(d).

The second problem with NBC's argument is that it conflicts with the prohibition on unauthorized transfers of control of broadcast licenses under Section 310(d).

Section 325(b) created retransmission consent rights for each commercial broadcast licensee, and no other entity. Consequently, retransmission consent constitutes an essential station matter and a fundamental operating policy. It is well-settled under Section 310(d) that a broadcast licensee cannot delegate or assign responsibility for such matters without first obtaining the Commission's consent.⁹⁶

Consequently, the restrictions on affiliates imposed by NBC constitute unauthorized transfers of control. Given NBC's admission of how it abrogates affiliates retransmission consent rights, enforcement action is appropriate.

By restricting affiliates' retransmission consent rights, NBC violates the good faith negotiation regulations. NBC's argument also flounders under Section 325(b) and the good faith negotiation regulations.

⁹⁶ See, e.g., *Letter from FCC to Washington Broadcast Management Co., Inc., Licensee of KBRO (AM)*, 13 FCC Rcd 24168, 24169 (1998) ("Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming, and finances, cannot be delegated."); *In the Matter of Liability of Kenneth B. Ulbricht, Memorandum and Opinion and Order and Forfeiture Order*, 12 FCC Rcd 11362, ¶ 6 (1996) ("In ascertaining whether an unauthorized transfer of control has occurred, the Commission focuses on whether an individual or entity other than the licensee has obtained the right to determine the basic operating policies of the station.").

In enacting Section 325(b), Congress intended to create a marketplace for retransmission consent. “It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals. . .”⁹⁷ As this statement and the statute make clear, Congress did not limit the scope of retransmission consent to in-market negotiations. The express language of Section 325(b) applies to all commercial broadcast stations – local and distant alike.⁹⁸

Likewise, the requirement that a broadcaster negotiate in good faith applies to all negotiations, both in-market and out-of-market. Neither the statute nor the Commission’s regulations make any distinction on this point.

In implementing Section 325(b)(3)(C), the Commission established seven objective standards, and a subjective “totality of the circumstances” test.⁹⁹ In adopting the objective standards, the Commission intended to provide “concise, clear” standards where the proscribed conduct would “constitute a violation of the good faith standard in all possible instances.”¹⁰⁰ Put another way, the Commission did not intend the standards to govern negotiations on one side of a DMA boundary and not the other.

NBC’s argument implicates the prohibition on agreements preventing a broadcaster from granting retransmission consent to any MVPD.¹⁰¹ The *SHVIA Implementation Order* addresses this conduct without equivocation:

⁹⁷ S. Rep. No. 102-92, 102d Cong., 1st Sess., 1992 U.S.C.C.A.N. 1133 (1991), at 1169.

⁹⁸ 47 U.S.C. § 325(b) (2004) *amended by* PL 108-447 § 201, 118 Stat 2809, December 8, 2004.

⁹⁹ 47 C.F.R. § 76.65(b)(1), (2).

¹⁰⁰ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, CS Docket No. 99-363, 15 FCC Rcd. 5445, (2000) (“*SHVIA Implementation Order*”), ¶ 31 (emphasis added).

[A] broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD. It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach an agreement with that MVPD.¹⁰²

Nothing exempts network affiliate agreements from this regulation. Nowhere do the regulations contain an “out-of-DMA” exception.

It is important to recall that supporters of this standard included NBC. The *SHVIA Implementation Order* states, “NBC proposes . . . that extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement, should also evidence violations of the good faith negotiation requirement.”¹⁰³

In the face of this, NBC now claims that “a third party” does not mean a third party that is NBC. NBC argues they must be excluded from this prohibition to control their programming. “If networks and other program producers are unable to control the distribution of their copyrighted content, the value of that programming will plummet, which will discourage further program production, thereby depriving consumers of diverse programming sources and choices.”¹⁰⁴ If NBC is genuinely worried about the value of its content, it has ample ability to borrow a page from the Disney/ABC/ESPN Monday Night Football playbook, or even NBC’s own Olympic playbook, and move

¹⁰¹ 47 CFR § 76.65(b)(1)(vi).

¹⁰² *SHVIA Implementation Order*, ¶ 45 (emphasis added).

¹⁰³ *SHVIA Implementation Order*, ¶ 35 (emphasis added).

¹⁰⁴ NBC Opposition at 14.

content to a satellite channel. Once it chooses to put that programming on a broadcast station, it cannot restrict an affiliate's right to grant retransmission consent just because that consent would cross a DMA boundary.

B. Reply to Disney/ABC.

Disney's Opposition contains several arguments similar or identical to NAB's. We address those arguments in Section V.C. We reply to one additional argument here.

1. Disney's \$2 "valuation" of retransmission consent shows that nearly all of the "price" is based on excluding lower-cost alternatives and not on the value of the programming.

Disney argues that substantial retransmission consent fees, \$2.00 or more per subscriber per month, reflect the "fair market value" of ABC O&O stations, based on the Disney-commissioned Retransmission Consent Economic Analysis.¹⁰⁵ Disney implies that because of this valuation, its stated stand-alone price of \$0.70 - \$0.80 per subscriber per month is "completely reasonable." Disney's argument fails because of a false premise. "Fair market value" presumes the existence of a competitive market. Valuation of Disney's stations in a competitive market would lead to a far different price. An example is readily available.

Many smaller cable companies operating in western states retransmit, and pay for, KMGH, the Denver ABC affiliate owned by McGraw-Hill Broadcasting. The price is reportedly between \$0.15 and \$0.20 per subscriber per month. Moreover, the signal is

¹⁰⁵ Disney Opposition at 6 (citing Michael G. Baumann and Kent W. Mikkelsen, THE FAIR MARKET VALUE OF LOCAL CABLE RETRANSMISSION RIGHTS FOR SELECTED ABC OWNED STATION (July 15, 2004) ("Retransmission Consent Economic Analysis")).

available via satellite to any cable system out of the Denver market. This signal contains the same network programming as ABC O&O stations.

Before a smaller cable company can retransmit KMGH, there is a catch. Even though McGraw-Hill owns the broadcast license and the attendant retransmission consent rights, an out-of-market cable system must request Disney's permission before KMGH can grant retransmission consent. With that permission, the smaller cable company can retransmit the ABC signal between \$0.15 and \$0.20 per subscriber. Without that permission, even being on the fringes of ABC O&O DMA's where a good quality signal is unavailable, the smaller cable operator must pay Disney's price.

So while Disney claims a value of \$2.00 on one hand, with the other it denies the availability of lower-cost substitutes. This represents the antithesis of a competitive market, and no "fair market" valuation can result.

C. Reply to NAB.

We reply here to 14 arguments raised by NAB. In some form, most of these arguments arise in the other Oppositions as well.

1. Contrary to NAB's assertions, the Petition sets forth a rational basis to grant the requested changes, and the record supports it.

NAB argues "ACA's petition provides no rational basis on which to launch a rulemaking proceeding. . .¹⁰⁶ This arguments fails on its face and on the record.

¹⁰⁶ NAB Opposition at iii. The other Oppositions make substantially the same argument. NBC Opposition at 16-20; Pappas Opposition at 7-10; Disney Opposition at 11-16; Duhamel Comments at 1.

The issues raised in the Petition are a matter of continuing importance to the Commission. The Commission has expressed concern about the abuse of retransmission consent against smaller providers and has committed to address it.¹⁰⁷ Just last year, the Commission agreed with ACA that small and medium-size cable operators are especially vulnerable to temporary withdrawal of broadcast signals.¹⁰⁸ The Commission also concluded that consumers and competition are harmed when a broadcaster threatens temporary withdrawal to extract higher prices.¹⁰⁹ As described above, the record overwhelmingly supports the Petition's presentation of the issues, the public interest harms that will result, and how the limited, narrowly-tailored adjustments will address the problem.

This foundation provides a rational and compelling basis for granting ACA's proposal now.

2. Contrary to NAB's assertions, the Petition and the record set forth ample justification for the proposed changes.

NAB argues that the Petition does "not provide any justifications for the change it proposes." This argument fails on its face and on the record.

The Petition sets forth six primary justifications for the proposed changes:

¹⁰⁷ *In the Matter of Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order and further Notice of Proposed Rulemaking, CS Docket No. 98-120, 16 FCC Rcd. 2598 (2001) ("DTV Must Carry Order"), ¶¶ 34-35 (referencing comments of the Small Cable Business Association, former name of ACA: "[SCBA] states that the unregulated analog retransmission consent demands, and tying in particular, pose a major threat to small cable's financial viability . . . we acknowledge the important concerns raised by SCBA . . . if, in the future, cable operators can demonstrate harm . . . we will be in a better position to consider appropriate courses of action.")

¹⁰⁸ *News Corp. Order*, ¶ 176.

¹⁰⁹ *Id.*, ¶ 202-204.

- By using exclusivity regulations and contractual restrictions, broadcasters and networks plan to charge small and medium cable companies an additional \$860 million for retransmission consent.¹¹⁰
- This plan will harm consumers and competition.¹¹¹
- This plan conflicts with the policies underlying broadcast exclusivity and retransmission consent.¹¹²
- The proposed solution will, in limited cases, allow market forces to moderate retransmission consent “pricing”.¹¹³
- Consumers and competition will benefit.¹¹⁴
- The proposed changes are limited in scope, affecting cable companies serving no more than 8% of all television households.¹¹⁵

The record corroborates each justification and provides additional examples and support for the Petition. This foundation, combined with broadcasters’ use of exclusivity to extract sharply higher retransmission consent fees, provides ample justification for granting ACA’s proposal now.

3. Contrary to NAB’s assertions, the ACA proposal aligns fully with the intent of Congress.

NAB claims that the ACA proposal “would violate the intent of Congress.”¹¹⁶ NAB argues, “Congress intended that some broadcasters might appropriately determine that monetary compensation is warranted and suitable. ACA’s proposed rules would, in

¹¹⁰ Petition at 25.

¹¹¹ Petition at 11.

¹¹² Petition at 6-13, 17.

¹¹³ Petition at 25, 33-35.

¹¹⁴ Petition at 25-32.

¹¹⁵ Petition at 34-35.

¹¹⁶ NAB Opposition at iii. The other Oppositions make substantially the same argument. NBC Opposition at 3-10; Pappas Opposition at 4-7; Disney Opposition at 2, 7, 17-21.

many instances, effectively preclude such compensation.”¹¹⁷ This argument fails on at least two grounds.

First, NAB’s argument contains a glaring omission. Congress specifically directed the Commission to evaluate the impact of retransmission consent regulations on basic rates.¹¹⁸ Not only does the legislative history reflect this concern, the statute mandates it.¹¹⁹ In the face of broadcasters’ plans to use exclusivity and retransmission consent to extract an additional \$1 billion or more from consumers served by small and mid-size cable companies, the statute *obligates* the Commission to act.

Second, while NAB correctly cites the intent “to create a marketplace for retransmission consent rights.”¹²⁰ NAB advocates a “marketplace” with competing distributors but only exclusive suppliers. And as stated by NAB, the price for retransmission consent in this “market” is what the broadcaster determines “is warranted and suitable,” while the same broadcaster blocks readily available lower cost alternatives. The retransmission consent regime advocated by NAB bears no resemblance to a competitive marketplace.

When broadcasters use exclusivity this way, consumers and competition are harmed. No legitimate argument can be made that Congress intended for retransmission consent to harm consumers. Consistent with Congressional intent,

¹¹⁷ NAB Opposition at 22.

¹¹⁸ H.R. Conf. Rep. No. 102-862, at 1258.

¹¹⁹ 47 U.S.C. § 325(3)(A).

¹²⁰ NAB Opposition at 22 (*citing* ACA Petition at 17 (paraphrasing S. Rep. No. 102-92, at 1169. (“It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . ”))

ACA's proposal will moderate sharp increases in basic cable costs by encouraging marketplace pricing of retransmission consent.

4. Contrary to the assertions of NAB, changed marketplace conditions warrant adopting the ACA proposal.

NAB argues, "there are no 'changed conditions' to justify the Commission's intervention in the marketplace in favor of ACA's membership."¹²¹ This argument mischaracterizes the Petition and fails on the facts.

To clear up this mischaracterization, the ACA proposal does not require Commission intervention in the marketplace. To the contrary, it is deregulatory and, in limited circumstances, removes barriers to marketplace pricing of retransmission consent, but only when those barriers are used to increase costs for consumers.

Concerning changed circumstances, the Petition describes three:

- Ad-supported commercial network broadcasting has matured into a robust "survivor in a sea of competition" and does not need additional leverage over small and medium-sized cable companies.
- Small and medium-sized cable companies present no threat of harmful competition to network broadcast stations.
- Broadcasters are targeting the small cable sector and its customers for more than \$860 million in additional retransmission consent payments.

We take these in order.

¹²¹ NAB Opposition at iii. The other Oppositions make substantially the same argument. NBC Opposition at 16-20; Pappas Opposition at 7-10; Disney Opposition at 11-16; Duhamel Comments at 1.

First, concerning the financial condition of the broadcast industry, the Petition based its analysis on Commission studies and orders.¹²² If NAB has an argument with this, that argument is with the Commission, not with ACA. Moreover, even if sectors of the broadcast industry are feeling financial pressure, station group owner Block Communications makes clear that harming consumers through retransmission consent fees is not the answer:

While we could attempt to solve revenue concerns in the short term by using the leverage of exclusivity and control over “must have” programming to charge smaller cable companies substantial fees, this would hurt consumers and would conflict with our duties to advance the public interest.¹²³

Second, protecting broadcasters from harmful competition by cable is the foundation of the Commission’s broadcast exclusivity policy. Where small and medium-size cable companies are concerned, whatever competitive threat may have existed, it does not exist today. Station group owner Block Communications puts it best:

As a broadcaster, we can fully validate ACA’s statement that no smaller cable company presents a competitive threat to our broadcast stations today. In short, they need our programming more than we need their subscribers. To use exclusivity regulations to further disadvantage smaller cable companies and extract higher fees squarely conflicts with the long-standing policy basis for those regulations.¹²⁴

¹²² Petition at 18-20 (citing *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, FCC 05-13, 2005 WL 275740 (rel. Feb. 4, 2005), ¶ 14; Jonathan Levy et al., *Broadcast Television: Survivor In A Sea Of Competition* (Federal Communications Commission, Office of Plans and Policy, Working Paper Series No. 37, 2002) (“OPP Working Paper 37”) at 12; *In the Matter of: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172, 19 FCC Rcd. 1606 (2004) (“Tenth Annual Report”), ¶ 16.)

¹²³ Block Comments at 8.

¹²⁴ Block Comments at 7.

Finally, the most significant changed circumstance is the sharply increased price for retransmission consent. The record provides unequivocal support for ACA's estimate of \$860 million in new costs in the next round. NCTC and BCI calculate an even high cost – more than \$1 billion.¹²⁵ Moreover, NAB admits this changed circumstance, stating that its members are now “emboldened” to seek more cash,¹²⁶ or, as the record indicates, at least when dealing with smaller MVPDs. Strategic use of exclusivity is their primary tool to prop up the price.

These circumstances combine to provide ample justification for adopting ACA's proposal.

5. Contrary to NAB's assertions, small and medium-sized cable companies have never had the “upper hand” in retransmission consent negotiations.

NAB argues that the Petition should be denied because “cable has had the upper hand in retransmission consent negotiations since the first negotiation in 1992.”¹²⁷ This argument fail because it is based on a false premise or is irrelevant.

First, if NAB includes small and medium-sized cable companies within its definition of “cable,” then it is ignoring the substantial record of retransmission consent abuse and the Commission's ongoing concern about it.¹²⁸ Most recently, the Commission concluded that small and medium-sized cable companies are especially

¹²⁵ NCTC Comments at 3; Block Comments at 5.

¹²⁶ Reply Comments of NAB, MB Docket No. 05-28 (filed March 31, 2005) at 18.

¹²⁷ NAB Opposition at iii. The other Oppositions make substantially the same argument. Pappas Opposition at 8; Disney Opposition at 2-3; Duhamel Comments at 3-4.

¹²⁸ See, e.g., *DTV Must Carry Order*, ¶¶ 34-35.

vulnerable to the temporary withdrawal of broadcast programming.¹²⁹ Consequently, an argument based on small and medium-sized cable companies having “the upper hand” fails due to a false premise.

Second, if NAB means by “cable” the entire cable industry, then this argument is irrelevant. At most, the Petition applies to cable companies serving 8% of the television households. No change occurs for cable companies and other MVPDs serving the other 92%.

Consequently, the Commission need not be distracted by NAB’s “upper hand” argument.

6. Contrary to NAB’s assertions, the Petition and the record show that small and medium-sized cable companies value local broadcast programming and do not demand it for “free.”

At least seven times, NAB argues that the Commission should deny the Petition because ACA has filed the Petition “so that ACA’s members can obtain valuable programming rights for free.”¹³⁰ A review of the Petition and the record expose this argument as groundless hyperbole. As stated in the Petition:

ACA does not request a prohibition on additional cash payments or other consideration for retransmission consent. We only request that for small cable companies, market forces help determine the “price.”¹³¹

The record in this proceeding fully validates that small and medium-size cable companies value local signals and recognize that a fair exchange of value for carriage is

¹²⁹ *News Corp. Order*, ¶ 176.

¹³⁰ NAB Opposition at iv, 1-2, 9, 10, 11, 21, and 22-23. The other Oppositions make substantially the same argument. NBC Opposition at 2, 3-10, 16, 19-20; Disney Opposition at 2-3.

¹³¹ Petition at 33.

appropriate. As stated by Milestone Communications and others, “The problem is not that broadcasters demand a ‘price’ for retransmission consent. The problem is that they block our ability to find lower cost alternatives. . . I want the Commission to know that we support local broadcasting and prefer to carry our local broadcasters.”¹³² All cable commenters reflect this theme.

The Commission can dismiss NAB’s “free rider” argument as baseless.

7. Contrary to NAB’s assertions, ACA’s proposal is limited in scope and only applies to a small fraction of cable companies.

NAB asks the Commission to deny the Petition because it would benefit cable companies “even if the cable operator were part of a multi-billion dollar cable conglomerate and even if the network station from which it would be able to obtain this free programming was a small family-run company.”¹³³ This argument fails because of a false premise.

As the Petition makes clear, the proposal applies only to those companies that the Commission has already determined are especially vulnerable to temporary withdrawal of programming.¹³⁴ At most, these companies serve 8% of US television households. As the record reflects, “multi-billion dollar cable conglomerates” are not included within the scope of the requested relief.

¹³² Milestone Comments at 2.

¹³³ NAB Opposition at 1; Duhamel Comments at 2-4.

¹³⁴ Petition at 23-25.

Moreover, the record shows that “small family-run” broadcasters like Block Communications and Duhamel Broadcasting have a history of focusing on maximizing distribution through mutually beneficial carriage arrangements. Nothing in ACA’s proposal will interfere with those arrangements.

8. Contrary to NAB’s assertions, ACA’s proposal will not affect negotiations between broadcasters and “huge conglomerates” that own rural systems.

NAB argues that the Commission should deny the Petition because major MSOs operate rural systems. NAB states:

[T]here is evidence to suggest that the relative bargaining position between cable and broadcasters is unchanged or worse for broadcasters since 1992 because, in many so-called ‘rural markets’ a relatively small broadcaster must negotiate with a cable operator owned by a huge conglomerate. This is exemplified by the fact that, while a majority of cable subscribers in hundred-plus markets are served by one of the five largest cable MSOs (as noted in Appendix A), only 3% of the television stations in these markets are owned by one of the top ten television station groups.¹³⁵

This argument fails as a *non sequitur*. The Petition applies to small and medium-sized cable companies, many of which operate rural cable systems. The Petition does not apply to “the largest cable MSOs,” even if they operate rural cable system. The Commission can disregard NAB’s “huge conglomerate” argument.

¹³⁵ NAB Opposition at 5.

9. Contrary to NAB's assertions, network programming is "must have," giving local broadcasters powerful leverage over small and medium-sized cable companies.

NAB argues that the Petition erroneously describes network programming as "must have" programming, and on this point, "ACA's analysis is extraordinarily flawed."¹³⁶ On its face, this argument is a disagreement with the Commission, not ACA.¹³⁷ Digging deeper, we find that NAB makes a variety of irrelevant assertions.

First, NAB argues that "ACA completely ignores the massive consolidation and 'clustering' in which the cable industry has engaged during this period, as well as the impact those developments have had on small broadcasters who must deal with these cable behemoths. In June 2004, the four largest cable operators served approximately 58% of all U.S. cable subscribers."¹³⁸ While this factoid may describe cable consolidation, it has no bearing on the Petition. As the Petition makes clear, the ACA proposal does not apply to "cable behemoths," so MSO clustering and consolidation are irrelevant.

Second, NAB takes issue with ACA's assertion that network stations can threaten the survival of small cable companies by withholding programming.¹³⁹ The Petition cites to the Commission's analysis in the *News Corp. Order*, where the

¹³⁶ NAB Opposition at 5. The other Oppositions make substantially the same argument. NBC Opposition at 18.

¹³⁷ Petition at 21 (citing *News Corp. Order*, ¶ 202 ("[W]e agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.") and ¶ 176 ("[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming . . ."))

¹³⁸ NAB Opposition at 5.

¹³⁹ NAB Opposition at 6.

Commission concluded that small and medium-sized cable companies are especially vulnerable to temporary withdrawal of local network stations.¹⁴⁰ NAB wonders “how this relates, for example, to the alleged ability of Duhamel Broadcasting Enterprises, owner of ABC television affiliates in Rapid City, Cheyenne, and Scottsbluff, to threaten the survival of small cable companies.”¹⁴¹

Duhamel’s comments answer NAB’s question.¹⁴² First, Duhamel makes no reference to any small cable companies in its markets, so if there were none, it could not threaten their survival.¹⁴³ Second, Duhamel makes clear that its primary focus is getting distribution on major MSOs like Comcast in its rural markets.¹⁴⁴ Third, Duhamel describes strong commitment to maximizing distribution in its markets.¹⁴⁵ As Block Communications states, it is this commitment, in part, that dissuades them from imposing sharply higher retransmission consent fees on smaller cable companies, even though they could.¹⁴⁶ Until proven otherwise, we will attribute this same admirable aim to Duhamel, and commend them for it.

¹⁴⁰ Petition at 21 (citing News Corp. Order, ¶ 202 (“[W]e agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.”) and ¶ 176 (“[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for ‘must have’ programming . . .”))

¹⁴¹ NAB Opposition at 6.

¹⁴² Duhamel Comments at 1-4.

¹⁴³ Duhamel Comments at 1-4.

¹⁴⁴ Duhamel Comments at 2.

¹⁴⁵ Duhamel Comments at 3.

¹⁴⁶ Block Comments at 6.

Next, NAB claims ACA has created a new definition of “must have” programming. “Plainly, ACA’s concept of ‘must-have’ programming is simply programming its members ‘wish’ to have for free so they can resell it to their subscribers for profit.”¹⁴⁷ Again, here NAB disagrees with the Commission concerning the “must have” nature of network broadcast programming. We have earlier rebutted NAB’s claim that the aim of the Petition is to obtain programming for “free.”

Finally, NAB argues if ACA members are so concerned about “must have” programming, they can just do it themselves. “In the end, the short answer to ACA’s complaint about access to broadcast programming is that there is nothing to prevent its members from developing equally popular programming.”¹⁴⁸ NAB’s statement ignores the Commission’s recent analysis of barriers to entry into the broadcast market.¹⁴⁹ NAB offers no information that would modify this analysis, and its argument fails of its own weight.

10. Contrary to NAB’s assertions, ACA’s proposal does not threaten smaller market broadcasters.

NAB argues that the Petition should be denied because “the consequences of adopting any such proposal would be particularly dire for stations in small and medium-size markets.”¹⁵⁰ NAB claims that for these stations, “even the erosion of a few

¹⁴⁷ NAB Opposition at 10.

¹⁴⁸ NAB Opposition at 11.

¹⁴⁹ *News Corp. Order*, ¶ 201-202 (finding that entry into the broadcast station market is “difficult” and “highly restricted”).

¹⁵⁰ NAB Opposition at 15-16. The other Oppositions make substantially the same argument. NBC Opposition at 7-12; Pappas Opposition at 9; Disney Opposition at 17; Duhamel Comments at 3-4.

percentage points of revenues caused by a reduction in the zone within which they are able to exercise nonduplication protection will undoubtedly affect the service they can provide to their communities.”¹⁵¹ The economics of this argument are dubious. Nexstar provides a recent example of a 100-plus market broadcaster that readily gives up viewership to hold out for cash.¹⁵² Economic assumptions aside, NAB’s argument fails because of a false premise.

ACA’s proposal will not result in the loss of *any* revenue for a smaller market broadcaster, unless that broadcaster willingly chooses to withdraw its signal. To the contrary, carriage, and the resultant audience reach and ad revenues, are assured, either through must-carry or retransmission consent. A broadcaster seeking sharply higher compensation may face some competition, but that involves a rational economic choice by the broadcaster.

As described by NCTC and Block Communications, under ACA’s proposal, in the vast majority of negotiations, when local broadcasters seek compensation that reasonably reflects the exchange of value, deals will be struck, and carriage will continue as before.¹⁵³ In this way, broadcaster revenues, including for small broadcasters, will be enhanced, not reduced.

¹⁵¹ NAB Opposition at 14.

¹⁵² Nexstar Broadcasting and Mission Broadcasting, Complaint for Enforcement, CSR - ____ (filed January 19, 2005).

¹⁵³ NCTC Comments at 5; Block Comments at 2-3.

11. Contrary to NAB's assertions, ACA's proposal fully aligns with localism and broadcasters' public service obligations.

NAB argues that the Petition should be denied because the current exclusivity regime "is absolutely essential to preserve localism and to enable broadcasters to fulfill their public service obligations."¹⁵⁴ Up to a point, this statement finds support in the Petition.¹⁵⁵ This statement becomes false when exclusivity is used to extract substantial fees from consumers served by small and medium-sized cable companies.

On this point, the Commission's statement made 25 years ago remains apt today:

[O]ur system of broadcasting places significant weight on the value of 'localism' and on the understanding that broadcast station licensees are public trustees that must serve the 'public interest, convenience, and necessity' even if, in particular circumstances, that does not comport with their own immediate economic interests.¹⁵⁶

As NBC states, "broadcast stations must rely solely on the sale of advertising spots to generate revenue."¹⁵⁷ To protect this revenue stream, exclusivity may be good policy. But when the "immediate economic interests" of broadcasters drive them to use exclusivity to impose sharply higher retransmission consent fees on cable customers, exclusivity must give way to competition.

¹⁵⁴ NAB Opposition at 18-19. The other Oppositions make substantially the same argument. NBC Opposition at 10-14; Disney Opposition at 18-19; Duhamel Comments at 4.

¹⁵⁵ Petition at 3, 5, 13.

¹⁵⁶ 1980 *Syndex Order* at ¶ 6 (citations omitted).

¹⁵⁷ NBC Opposition at 13.

No principal of localism or the public interest supports broadcasters using exclusivity to extract higher retransmission consent fees from local markets, and NAB's argument fails.

12. Contrary to NAB's assertions, ACA's proposal will not result in a few stations "cannibalizing" other stations' markets.

NAB argues that the Petition should be denied because it "could effectively destroy local program exclusivity by allowing a few stations to cannibalize other stations' markets."¹⁵⁸ This argument fails because the outcome NAB speculates is impossible under ACA's proposal.

NAB's feared cannibalism will not materialize for three reasons. First, the Petition affects, at most, those portions of markets containing only 8% of television households, while having no effect on portions of markets containing the other 92% of television households. As a result, any "market cannibalism" should die of starvation. Second, an out-of-market broadcaster could only nibble around another's protected zone if the in-market broadcaster sought substantial compensation that exceeded the value of the station. As explained by NCTC, in this circumstance, the in-market broadcaster will then make a rational economic decision to adjust its price or withhold its signal.¹⁵⁹ The choice remains with the broadcasters, and ACA's proposal fully preserves that choice.

¹⁵⁸ NAB Opposition at 19. The other Oppositions make substantially the same argument. NBC Opposition at 2, 6-12, 15.

¹⁵⁹ NCTC Comments at 4.

Third, the Commission has ample authority to address broadcaster “cannibalism” that threatens the public interest. As a result, NAB’s argument fails to provide any basis for the Commission to deny the Petition.

13. Contrary to NAB’s assertions, ACA’s proposal will protect consumers.

NAB next argues that the Commission should not adopt ACA’s proposal because consumers would be harmed. NAB states, “Consumers are the ultimate beneficiaries of exclusive distribution arrangements.”¹⁶⁰ If this argument has any validity, it is only to the extent that exclusivity is used to preserve advertising markets. The Petition and many commenters acknowledge this.¹⁶¹ The argument becomes false when exclusivity is used to impose sharply higher retransmission consent fees on consumers served by small and medium-sized cable companies.

As the record reflects, demands for sharply higher retransmission consent fees will result in sharply higher basic cable rates. No evidence supports the contention that consumers benefit when broadcasters use market power to extract supra-competitive retransmission consent fees. To the contrary, the Commission has recently concluded that this conduct harms consumers.¹⁶²

NAB’s “consumer protection” argument therefore fails.

¹⁶⁰ NAB Opposition at 19. The other Oppositions make substantially the same argument. NBC Opposition at 8, 16; Disney Opposition at 18-19.

¹⁶¹ Petition at 5; See *e.g.* NCTC Comments at 3, Block Comments at 2-3, 6.

¹⁶² *News Corp. Order*, ¶¶ 204-210.

14. Contrary to NAB's assertions, ACA's proposal will facilitate marketplace determination of the "true value" of retransmission consent rights.

NAB argues that the Commission should not adopt ACA's proposal because ACA seeks "to eliminate broadcasters' ability to achieve the true value of their retransmission consent rights in the marketplace."¹⁶³ This argument fails because the pricing mechanism advocated by NAB is not market-based. The Petition addresses the use by broadcasters of exclusivity to artificially inflate the price of retransmission consent by excluding other participants from the market. This results in retransmission consent prices that are neither "true values" nor market driven.

The Petition and the record contain examples of the "true value" of retransmission consent in markets where broadcasters cannot block alternatives.¹⁶⁴ The results are predictable. The price of retransmission consent comes down.

NCTC, the expert in transaction involving small and medium-sized cable companies, cogently describes the difference between the current retransmission consent pricing and market-based pricing:

In the absence of alternative suppliers, broadcasters are demanding extraordinary, artificially-supported prices, and setting them as high as possible. [W]hen a supplier faces competition, the supplier responds by improving the product, lowering the price, or both. At NCTC we see this basic element of pricing theory in practice daily, and it works.¹⁶⁵

¹⁶³ NAB Opposition at 21. The other Oppositions make substantially the same argument. Pappas Opposition at 9-11; Disney Opposition at 5-9; NBC Opposition at 12-16.

¹⁶⁴ Petition at 26-32; Millennium Comments at 6-7.

¹⁶⁵ NCTC Comments at 4.

This is the dynamic that will result from the ACA proposal. At most, this will affect portions of broadcast market containing 8% of television households. In these limited cases, a marketplace will determine the “true value” of retransmission consent.

As indicated above, NAB fails to offer supportable reason why the Commission should not immediately adopt ACA’s proposal. We turn briefly to the remaining filings.

D. Reply to Pappas.

Pappas’ Opposition contains arguments similar or identical to NAB’s, NBC’s and Disney’s, and those arguments fail for the reasons stated above. We reply to one additional claim by Pappas.

1. Contrary to Pappas’ assertions, the Petition was not filed to “create a false sense of urgency.”

Pappas imputes the following motive to ACA: “One can only assume that the Petition was filed to create a false sense of urgency, and with the hope that the Commission would act quickly in granting the Petition without providing sufficient time for all interested parties to fully consider the impact of ACA’s proposal.”¹⁶⁶

In response, we would like to assure the Commission that ACA does not invoke Commission procedure without thorough deliberation. ACA has never before requested an adjustment to Commission regulations as described here, and the action has been carefully considered by the organization. As far as the timing of the Petition, that has been driven by broadcasters’ actions. As the record reflects, only recently have networks and major affiliate groups announced plans to sharply increase retransmission

¹⁶⁶ Pappas Opposition at 10.

consent fees. The timing of these demands is beyond our control, and we have proceeded with all reasonable dispatch.

E. Reply to Duhamel.

Duhamel's comments contain arguments similar to NAB's, and those fail for the reasons stated above. Duhamel also describes the challenges of serving rural markets and negotiating with media conglomerates like Comcast.¹⁶⁷ Duhamel states, "Given the relatively small audience base that the stations start with, the loss of even a few subscribers would impact the stations and their ability to continue to provide local service."¹⁶⁸

Insofar as "MVPD distribution is vital" to Duhamel,¹⁶⁹ ACA's proposal presents no threat. It does not apply to major MSOs that may have market power over Duhamel. And as described by NCTC, when dealing with small and medium-sized cable companies, Duhamel will likely promptly come to mutually acceptable carriage arrangements. The only situation where Duhamel would face an issue is if Duhamel decided to threaten withdrawal of its signal to seek supracompetitive fees.¹⁷⁰ That remains within Duhamel's control.

¹⁶⁷ Duhamel Comments at 3.

¹⁶⁸ Duhamel Comments at 3.

¹⁶⁹ Duhamel Comments at 3.

¹⁷⁰ NCTC Comments at 4-5.

F. Reply to Community Broadcasters Association.

CBA has filed an ex parte statement, acknowledging that ACA's Petition is meritorious, but asking the Commission to act on another petition first.¹⁷¹ On balance, the imminent harm threatened to consumers and competition, as thoroughly described on the record here, warrants prompt action by the Commission on ACA's proposal. The issues raised in the petition referenced by CBA do not rise quite to that level of urgency, as indicated by the three and ½ year pendency of that item.

¹⁷¹ CBA Ex Parte at 3.

VI. CONCLUSION – BASED ON THE RECORD IN THIS PROCEEDING, THE COMMISSION CAN ADOPT THE ACA PROPOSAL NOW.

The Commission has before it ample evidence, including those from broadcasters, that new retransmission consent cash demands will cost consumers served by small and medium-sized cable companies \$1 billion during the next round. The Commission also has before it a narrowly-tailored, deregulatory, market-based proposal to address the problem. As stated by the Rural Telephone Companies, “an advantage of the ACA proposal is that the relief sought does not need Congressional approval or statutory revisions and can be effected by the Commission in time for the next election cycle. . . .”¹⁷² The Commission has ample authority to grant ACA’s proposal now.

Under 47 CFR § 1.412(c) and 5 U.S.C. §553(b) of the Administrative Procedures Act, the Commission can amend its regulations without further procedure when the Commission “finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest.” All elements apply in this case. First, the Commission has already provided notice and has developed a substantial record. All interested stakeholders or their representatives have participated. Therefore, further public procedure is impracticable or unnecessary. With small and medium-size cable operators facing in excess of \$1 billion in new retransmission consent fees, the public interest harm is manifest, as the Commission has already concluded.¹⁷³ Given the

¹⁷² RTC Comments at 2.

¹⁷³ *News Corp. Order*, ¶ 209-210 (The potential public interest harms that would result from such a strategy [the [broadcaster's] ability to temporarily withhold...signals...as a negotiating tactic] are substantial.”).

imminent threat of substantial public interest harm and the already exhaustive record, the Commission has ample authority to make the changes requested without further ado.¹⁷⁴

Respectfully submitted,

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May 3, 2005

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¹⁷⁴ See *In The Matter Of Unbundled Access To Network Elements, Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 16,783 (2004), at ¶ 27 (adopting regulations due to need for near-term action).

Exhibit A
Commenters in Support
of ACA's Proposal

Cable Companies

Letter from Mr. Jeffrey A. Ross, President of Armstrong Utilities, Inc. ("Armstrong Comments") (serving over 227,000 subscribers in five states).

Letter from Mr. Greg Davis of ATC.

Comments of Atlantic Broadband Finance, LLC ("ABB Comments") (serving about 250,000 subscribers in six states).

Letter from Mr. James L. Beattie, Assistant General Counsel of BEVCOMM (serving over 227,000 subscribers in 5 states).

Letter from Ms. Kay Monigold, President and COO of Buford Media Group, L.L.C. ("Buford Comments") (serving 55,000 subscribers in eight states).

Letter from Mr. Dave Beasley, Vice President of Cable Management Associates ("CMA Comments") (serving over 60,000 subscribers in four states).

Letter from Mr. Jeffrey T. Smith, President of Cable Vision Services, Inc. (serving 1,143 subscribers in rural Alabama).

Letter from Mr. Robert Carson, President and General Manager of Carson Communications, LLC (serving 5900 subscribers in 23 systems).

Letter from Mr. Donald L. Bell, Vice President and CEO of Cass Cable TV, Inc. (serving 11,000 subscribers in 4 DMAs).

Letter from Mr. Pete Abel, Vice President of Community Relations of Cebridge Connections ("Cebridge Comments").

Letter from Champion Broadband, LLC (serving 2,000 subscribers in Eastern Colorado and Wyoming).

Letter from Mr. Marvin Seward, Broadband Director of Columbia Power & Water Systems ("CPWS Comments").

Letter from Mr. Paul Schuetzler, GM/CEO of Consolidated Cable Vision, Inc. (serving 5,250 subscribers in rural North Dakota).

Letter from Mr. Jeffrey T. Smith, President of Coosa Cable Company (serving 7,021 subscribers in rural Alabama).

Letter from Ms. Linda Jane Maaia, Chief Operating Officer of Full Channel TV, Inc. ("Full Channel TV Comments") (serving 7,742 subscribers in Rhode Island).

Letter from Mr. Larry Eby, Vice President of Operations of Galaxy Cablevision ("Galaxy Comments") (serving 55,000 subscribers across thirteen states).

Letter from Ms. Linda S. Stuchell, Programming of Harron Entertainment Company, LLC (serving 105,000 subscribers in five states).

Letter from Ms. Donna Lycom of Lycom Communications, Inc. (serving 2,500 subscribers in rural Kentucky and West Virginia).

Comments of Mediacom Communications & Cebridge Connections ("Mediacom & Cebridge Comments").

Letter from Mr. Steven Murdough, VP and GM of MetroCast Cablevision ("MetroCast Comments") (serving less than 70,000 subscribers in two states).

Letter from Mr. Michael M. Drake, President of Milestone Communications, LP ("Milestone Comments") (serving 3,200 subscribers in three states).

Comments of Millennium Digital Media Systems. LLC ("Millennium Comments").

Letter from Ms. Holly Starnes, President of Millington Cable (serving 6,250 subscribers in rural Tennessee).

Letter from Mr. Eugene R. Edwards, President and General Manager of Nelsonville TV Cable, Inc. ("Nelsonville Comments") (serving 6,000 subscribers with 3 headends across 20 miles).

Letter from Mr. Richard K. Veach, General Manager and Chief Executive Officer of Pioneer Communications (serving 9,000 subscribers in rural Kansas).

Letter from Mr. Patrick J. Mastel, Senior Counsel of PrairieWave Communications, Inc. (serving 45,000 subscribers in 45 different markets in 3 states).

Letter from Ms. Belinda Murphy, Vice President and Controller of Rapid Communications LLC ("Rapid Comments") (serving 17,800 rural subscribers in six states).

Letter from Mr. Martin F. Brophy, President of Shen Heights TV Associates, Inc. (serving 4,000 subscribers in rural Pennsylvania).

Letter from Mr. Richard J. Sjoberg, President of Sjoberg's Inc. (serving 8,500 subscribers in rural Minnesota).

Letter from Mr. Ron Snelick, General Manager of St. Mary's Cable Television ("St. Mary's Cable Television Comments") (serving 5,900 subscribers in rural Pennsylvania).

Letter from Mr. Patrick Knorr, General Manager of Sunflower Broadband (serving 30,000 subscribers in eastern Kansas).

Letter from Mr. James D. Munchel, President and COO of Susquehanna Communications (serving 235,000 subscribers in six states).

Letter from C.W. Pickelsimer, Jr., President of Sylvan Valley CATV Company.

Letter from Mr. Frank R. Vicente, Sr. Vice-President for Operations and Assistant Secretary of Tele-Media Corporation of Delaware (serving 4,600 subscribers in two states).

Letter from Mr. Arthur M. Smith, Vice President of Trinity Cablevision, Inc. (serving 695 subscribers in rural Alabama).

Letter from Mr. Stuart Gilbertson, Chief Operating Officer of USA Companies (serving 15,000 subscribers in four states).

Letter from Mr. Steve Guest, P.E., President and General Manager of Vi-Tel, Inc. (serving 220 subscribers in Davenport, OK).

Letter from Mr. Steve Friedman, COO of Wave Broadband.

Letter from Mr. John Harrison of Waycross Cable Company.

Letter from Neal Schnog, Chief Executive Officer of Western Broadband (serving 10,000 subscribers in retirement communities of Arizona).

Letter from Ms. Colleen Abdoulah, President and Chief Executive Officer of WideOpenWest.

Municipal Systems and Co-ops

Letter from Ms. Valerie O. Fong, General Manager of Alameda Power & Telecom ("Alameda P&T Comments") (serving 33,000 subscribers in Alameda, CA).

Letter from Mr. Jeffrey C. Mills, P.E. City Engineer of City of Bardstown ("City of Bardstown Comments") (serving 8,100 subscribers in Nelson County, KY).

Letter from Mr. Kevin M. Maynard, Secretary of City of Wyandotte ("City of Wyandotte Comments") (serving 10,000 subscribers in the Wyandotte, MI).

Letter from Mr. John Higginbotham, Superintendent of Frankfort Plant Board ("FPB Comments") (serving 17,600 subscribers in rural Kentucky).

Letter from William J. Ray, Superintendent of Glasgow Electric Plant Board ("Glasgow Comments") (serving 8,000 subscribers in rural Kentucky).

Letter from Mr. Larry Kielsmeier, General Manager of Hubbard Co-Op Cable ("Hubbard Comments") (serving 250 subscribers in Hubbard, IA).

Letter from Mr. Johnny Estes of Paragould Light, Water & Cable ("Paragould Comments") (serving over 10,000 subscribers in Paragould, AR).

Small Telephone Companies

Comments of CT Communications Network, Inc. et al ("RTC Comments").

Organizations

Comments of National Cable & Telecommunications Association (“NCTA Comments”).

Comments of National Cable Television Cooperative, Inc. (“NCTC Comments”).

Comments of National Telecommunications Cooperative Association (“NTCA Comments”).

Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO Comments”).

Programmers

Comments of Crown Media United States LLC (“Crown Media Comments”).

Comments of Courtroom Television Network LLC (“Court TV Comments”).

Others

Comments of Bellsouth Corporation & Bellsouth Entertainment, L.L.C. (potentially serving 15,000 subscribers in two states).

Comments of Echostar Satellite L.L.C.

Ex Parte Statement of The Community Broadcasters Association (CBA Ex Parte”).

CERTIFICATE OF SERVICE

I, Amy Bowin, certify that I directed copies of the foregoing Reply of the American Cable Association to be served by First Class U.S. Mail today, May 3, 2005, to the persons listed below.

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